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No. 05-1157

IN THE

Supreme Court of the United States

CREDIT SUISSE FIRST BOSTON LTD., *et al.*,

Petitioners,

v.

GLEN BILLING, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT MILTON PFEIFFER

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Plaintiff Milton Pfeiffer, on behalf of himself and all others similarly situated, submits this brief in opposition to Defendants' Petition for a Writ of Certiorari. The Petition should be denied.

The United States Court of Appeals for the Second Circuit accurately applied the law governing implied immunity when it found no implied immunity for Defendants' unlawful conduct. The Petition presents no substantive reason for review. In addition, the Petition makes precise review impossible by mischaracterizing the decision of the Second Circuit (thus presenting a non-existent or non-justiciable issue for review) and misstating Pfeiffer's claim (thus offering the Court a non-existent or a non-justiciable matter for review).

Defendants contend that unless this Court reverses the Second Circuit's decision, the plaintiffs' bar will file antitrust strike suits, clog the federal courts, consume enormous judicial resources, and disrupt the capital formation process. (Cert. Pet. 27-30). Not so. The decision has not encouraged the filing of antitrust strike suits because it is limited to conduct that violates the antitrust laws and that Congress flatly barred by statute. If Defendants wish to avoid future liability, they should not engage in conduct the Second Circuit described as an "epic Wall Street conspiracy." *See* App. 1a-2a.

The Decision of the Second Circuit. To enhance their request for review, Defendants misstate the standard the Second Circuit applied to the two antitrust complaints. For thirty pages Defendants discuss "the court of appeals' rejection of implied immunity" (Cert. Pet. 30) and claim that the decision "requir[es] an overt statement of legislative intent" (Cert. Pet. 13), i.e., an express statement of immunity. In fact, the Court of Appeals applied a test of implied immunity, not express immunity, *see* App. 49a-53a; and as the basis for implied immunity, it specified five factors, it took from the decisions of this Court. *See* App. 53a-56a, 57a, 64a-67a.

Pfeiffer's Claims. Respondent Pfeiffer sued a group of "Institutional Defendants" and "Underwriter Defendants" for

violating the commercial bribery provision of Section 2(c) of the Robinson-Patman Act, 15 U.S.C. § 13(c), by paying and receiving bribes to manipulate the prices of hot issue, initial public offering securities in the aftermarket. The Second Circuit correctly described Pfeiffer's claim in its opinion: the Underwriter Defendants paid bribes to, or received bribes from, the Institutional Defendants to participate in a scheme designed to inflate the price of the hot issue securities in the aftermarket. *See* App. 18a-19a. Defendants mischaracterize Pfeiffer's claim as "based on the same alleged conduct" as the Sherman Act complaint (Cert. Pet. 3) and as "an 'indiscriminate assault' on [the] system of capital formation." (Cert. Pet. 2).

Unlike plaintiff Billing, the Sherman Act plaintiff, Pfeiffer does not seek recovery for pre-offer underwriting activities. He does not attack "road shows," building the book, or any other acts prior to the sale of the securities to the public. He does not challenge (or even mention) the combination of underwriters into underwriter syndicates, the centralizing agreement among underwriters, the application of the underwriter discount to underwriters who did not sell their allotment; does not challenge the syndicate system, road shows, the participation in self regulatory organizations, or the function as market makers; nor does he challenge the Defendants' ability to collaborate with one another in trade associations; hold meetings among top executives; disclose the names of customers who received allocations; or maintain systems that allowed them to review commissions, charges, and other payments received. (Cert. Pet. 3, 7).

All conduct that Pfeiffer alleges to be unlawful occurred in the aftermarket, i.e., after the shares had come to rest in the hands of investors. His theory does not, contrary to repeated arguments by Defendants, threaten the capital raising abilities of the United States financial markets. *See* App. 19a.

REASONS FOR DENYING THE PETITION

I. THE DECISION BY THE SECOND CIRCUIT DOES NOT CONFLICT WITH THIS COURT'S DECISIONS ON IMPLIED IMMUNITY

The Second Circuit correctly concluded that Congress did not intend to immunize Defendants unlawful aftermarket activities from the antitrust laws. In their Petition, Defendants mischaracterize the Second Circuit's decision and argue that it creates a "novel" test of express immunity that conflicts with this Court's earlier rulings of implied immunity. (Cert. Pet. 13, 19, 24).

After beginning with the premise that implied repeal is disfavored and should be granted only when there is "clear repugnancy" between the applicable antitrust laws and securities laws and then only to the minimum extent necessary, the Second Circuit held that the "touchstone" of the implied immunity analysis is Congressional intent. *See* App. 53a. In *Gordon v. New York Stock Exch., Inc.*, to determine congressional intent on repeal of the antitrust laws, this Court analyzed: (1) legislative history and statutory structure; (2) the possibility for conflicting mandates; (3) the possibility that application of the antitrust laws would moot a regulatory provision; (4) the history of agency regulation of the anticompetitive conduct; and (5) any other evidence indicating Congress intended to repeal the antitrust laws. *See* App. 57a; *Gordon v. New York Stock Exch., Inc.*, 422 U.S. 680-681, 689-690 (1975). The Second Circuit reviewed these factors and determined that they created no potential for conflict between the antitrust laws and the securities laws when applied to the conduct challenged by the two antitrust complaints. *See* App. 64a-67a.

By applying the factors this Court enunciated in *Gordon*, the Second Circuit has not created a "novel" test, it has not created a conflict with this Court's implied immunity rulings, and it has not diverged from the standards employed by other circuit courts. The Second Circuit relied on factors of which

one or more can demonstrate Congressional intent to repeal the antitrust laws by implication. It does not require any particular factor for implied immunity, nor does it hold that all or any one of the factors must be present before a court can find implied immunity. *See* App. 53a-57a.

Defendants also argue that, whenever the SEC asserts it has discretion and authority to act, the Court should blindly follow the SEC. (Cert. Pet. 10-12). But this Court has held that "whether implied repeal of the antitrust laws is necessary to make the Exchange Act provisions work is a matter for the courts." *Gordon*, 422 U.S. at 686; *Ricci v. Chicago Mercantile Exch.*, 409 U.S. 289, 306-308 (1973). Although the court may defer to a regulatory agency to take advantage of the agency's special expertise, the final decision is still for the courts. *Gordon*, 422 U.S. at 686; *Ricci*, 609 U.S. at 306-308. To keep its authority, discretion, and jurisdiction as large as possible, the SEC applies a knee-jerk answer to all antitrust immunity questions: it always finds implied repeal. In its *amicus* submission, the SEC says that the courts should find immunity even when the SEC is not empowered to authorize the specific conduct challenged. *See* App. 192a. This Court, in *Silver*, specifically rejected this argument and held there is no antitrust immunity when the SEC does not have the ability to authorize or require the challenged conduct. *See Silver v. New York Stock Exch.*, 373 U.S. 341, 359-360 (1963); *Gordon*, 422 U.S. at 689-690; *Otter Tail Power Co. v. United States*, 410 U.S. 366, 372-375 (1973). The SEC even admitted that if the conduct alleged in the complaints was limited only to tie-in arrangements and laddering agreements, the agency "does not have before it, nor does it currently anticipate, any proposals that would permit that sort of conduct" and that "it is difficult to envision circumstances in which" the SEC would authorize this conduct. *See* App. 67a, 189a.

II. THE DECISION DOES NOT THREATEN CAPITAL RAISING

Like all Defendants facing the possibility of a large multibillion dollar lawsuit, Defendants beg the Court to take their Petition by arguing that unless this Court protects them and approves their illegal, injurious conduct, the sky will collapse and the world as we know it will end. In this case, Defendants argue that failure to reverse the Second Circuit's decision will result in the annihilation of the United States capital markets. Nothing could be farther from the truth.

The Second Circuit rendered its decision in 2005. In 2006, Goldman Sachs reported "record net revenues, net earnings and diluted earnings per common share for its first quarter ending February 14, 2006." *See* Form 8-K of the Goldman Sachs Group, Inc. dated March 14, 2006, available at www.goldmansachs.com/ our_firm/investor_relations/financial_reports/ docs/8k-1q2006.pdf. Goldman Sachs reported that "Investment Banking produced net revenues of 14.7 billion, its second best quarter and its best quarterly performance in six years." *Id.*

Similarly, Morgan Stanley reported that its investment banking division, now called Institutional Securities, "achieved record net revenues of $5.5 billion, up 36 percent from last year." *See* Morgan Stanley Press Release, dated March 22, 2006, available at www.morganstanley.com/about/ir/shareholder/1q2006.html. The gloom and doom prediction by the SEC and Defendants has not proven accurate; nor has the Second Circuit's opinion disrupted "capital formation in the United States" through fear of treble damages. (Cert. Pet. 28).

CONCLUSION

For the reasons stated in this memorandum of law, this Court should deny Defendants' Petition for Certiorari and allow the action to be remanded to the District Court.

Respectfully submitted,

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